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Supreme Court of the United States

October Term, 1960

No. 32

C. M. GOMILLION, *et al.*,

Petitioners,

vs.

PHIL M. LIGHTFOOT, as Mayor of the City of Tuskegee, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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The American Civil Liberties Union, hereinafter called the "Union" respectfully moves for leave to file a brief *amicus curiae* in this case. The attorneys for petitioner have consented to the filing, but the attorneys for respondent have refused. Both the consent and the refusal have been filed with the Clerk of the Court.

The Union is a national non-political organization devoted solely to defending the civil liberties guaranteed by federal and state constitutions.

The Union is interested in the instant case because it believes that the State of Alabama has redesigned the boundaries of the City of Tuskegee to exclude Negroes from the City. By this discriminatory redistricting, the state infringed the constitutional rights of petitioners who are

of Negro origin and residents of the City of Tuskegee as designed prior to the enactment of this law.

The rights infringed include the 15th Amendment's guarantee that no State shall deprive a citizen of the right to vote on account of color, and the 14th Amendment's guarantees that no State shall deprive a person of property without due process of law, and that no State shall deny a person equal protection of the laws.

Although various aspects of these issues have been raised by petitioner in the lower courts and in the petition for a writ of certiorari, the Union believes that its discussion of them and of the jurisdictional question will be helpful to the Court.

The Union respectfully moves that it be granted leave to file the accompanying brief.

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of *Amicus*

The interest of *amicus* is set forth in the preceding motion for leave to file.

Statement of the Case

This is a class action instituted by twelve Negroes against officials of Tuskegee and Macon County, Alabama. The complaint questions the validity of an act of the 1957 Session of the Alabama Legislature rearranging the boundaries of the City of Tuskegee, Alabama so as to remove therefrom all but four qualified Negro voters, but no qualified white voter. Petitioners allege that the purpose and effect of the statute was to deny them the right to vote in city elections and to deprive them of the rights of municipal

citizenship, such as police protection, street improvements, and participation in city affairs. The prayer was for injunctions against the enforcement of the Act as to petitioners and their class.

The United States District Court for the Middle District of Alabama sustained defendants' motion to dismiss the complaint for failure to state a claim upon which relief could be granted and for lack of jurisdiction (167 F. Supp. 405). The Court of Appeals for the Fifth Circuit affirmed with one judge dissenting (270 F. 2d 294). The decision of the Court of Appeals was based upon two propositions, to wit:

> (1) In accordance with the "political question" and "equitable self-restraint" doctrines of jurisdictional limitation expounded in the cases of *Colegrove* v. *Green*, 328 U. S. 549 (1946), and *South* v. *Peters*, 339 U. S. 276 (1950), the complaint does not present a question which can be or should be judicially determined.
>
> (2) A municipality, being but a creature of the State, is subject to the arbitrary and plenary power of the Legislature, hence "the power of increase and diminution of municipal territory is plenary, inherent and discretionary in the Legislature, and, when duly exercised, cannot be revised by the courts". While such legislation must conform to the State Constitution, it is unrestrained by the Federal.

Under the view which it took of the case, the Court of Appeals was not required to decide whether any rights of petitioners protected by the Federal Constitution had been violated.

Issues Presented

A. Whether the jurisdiction of the Court to hear and determine this case is limited by the "political question" or "equitable self-restraint" doctrines?

B. Whether the power of a State to alter the boundaries of its municipal corporations renders such an act invulnerable to attack on grounds that it violates the Federal Constitution when the attack is made by "third persons" and when the purpose and effect of such act was to deprive such third persons of rights secured them by the Federal Constitution?

C. Whether the statute in question violates or abridges any right of petitioners which is protected by the Federal Constitution?

Summary of Argument

The Federal Judiciary has jurisdiction to hear and adjudicate the complaint below. The Federal judiciary power is neither barred by the Constitutional doctrine of separation of powers nor by the judicial self limitation known as equitable self-restraint.

The act challenged in this complaint, while based on the state constitutional power to define municipal boundaries, violates the Federal Constitution through the arbitrary misuse of that power in a calculated and successful effort to deprive individual persons (not a municipality) of rights secured them by the 14th and 15th Amendments. The complaint states a federal case involving gross racial discrimination which the petitioners are entitled to try and sustain.

ARGUMENT

I. This Court has jurisdiction to hear and determine this case as being one which arises under the Constitution and Laws of the United States, and jurisdiction is not here limited by the "political question" or "equitable self-restraint" doctrines.

Under Article Three of the Federal Constitution, the judicial power of the United States extends to all cases arising under its Constitution and laws. *Federal Inter-*

mediate Credit Bank v. *Mitchell* 277 U. S. 213 (1928). This Court has often had occasion to determine when and under what conditions an action could be said to involve a "Federal question". As a consequence certain guide posts have been established. The ultimate validity of the merits of a case is wholly extraneous to the determination of the existence of a Federal question. *Southern Pacific Railway Co.* v. *California*, 118 U. S. 109 (1886); *Bell* v. *Hood*, 327 U. S. 678 (1946). This Court has said that a case arises under the Constitution or laws of the United States whenever its correct decision depends on the construction of either. *Cohens* v. *Virginia*, 19 U. S. 264 (1821). It follows that allegations sufficient to show deprivation of rights secured petitioners under the Federal Constitution by State action presents a question arising under the Constitution and laws of the United States. Here the complaint alleges that the statute in question deprives petitioners of the right to vote on account of race in violation of the Fifteenth Amendment and denies them equal protection of the laws and of property without due process of the law in violation of the Fourteenth Amendment. Clearly the complaint presents a "Federal question" within the Court's jurisdiction unless limited by the "political question" or "equitable self-restraint" doctrines.

A clear line of demarcation should be drawn between these two oft-confused concepts of judicial limitation. The "political question" limitation is based upon the separation of powers doctrine; the "equitable self-restraint" limitation is self-imposed and has been employed by the Court to refuse equitable relief in some *political rights* cases. In the former the Court lacks jurisdiction; in the latter having jurisdiction, it merely refuses its exercise. It is therefore important to note the distinction between a political question and a political right. A political question is a question whose determination lies within the prerogative of another branch of government, and hence

is outside the jurisdiction of the court. A political right on the other hand is a personal and private right as distinguished from a property right, i.e., the right to vote, the presence of an issue of political rights, will not render a case non-justiciable, but may cause a court to refuse to exercise its equitable jurisdiction, as in *South* v. *Peters, supra.*

In view of the line of authority from *Nixon* v. *Herndon*, 273 U. S. 536 (1932); through *Terry* v. *Adams*, 345 U. S. 461 (1953), it cannot be seriously contended that the issue of the right to vote poses a non-justiciable political question. Nor can the cases of *Colegrove* v. *Green*, 328 U. S. 549 (1946); *MacDougall* v. *Green*, 335 U. S. 281 (1948); *South* v. *Peters, supra* or *Turman* v. *Duckworth*, 329 U. S. 675 (1946), be considered authority for the proposition that this case presents a non-justiciable issue. The *Colegrove* case cannot be taken as holding that the question presented was non-justiciable inasmuch as the majority of the members deciding that case thought that *Smiley* v. *Holm*, 285 U. S. 355 (1932), had determined that such issues were justiciable. Mr. Justice Rutledge agreed with the dissent that the court had jurisdiction, but thought that the injunction was rightly denied as a matter of equitable discretion.

The majority holding of this case was summarized by Mr. Justice Rutledge in *Turman* v. *Duckworth, supra*, at page 678 as follows:

> "A majority of the justices participating refused to find there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied."

That the court did not accept the doctrine of nonjusticiability seemingly expressed by Mr. Justice Frankfurter in the *Colegrove* case seems to be borne out by the later case of *MacDougall* v. *Green, supra.* The unanimous assump-

tion of jurisdiction by an otherwise divided court in that case can be taken as a holding that political rights cases, as distinguished from cases involving political questions, are clearly justiciable. The court then does not *lack* jurisdiction to hear and determine this case, neither should it refuse its exercise under the doctrine of "Equitable Self-Restraint". Suits at law for damages arising out of the federally protected right of suffrage have been entertained consistently in the Federal Courts. *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); *Nixon* v. *Herndon, supra; Nixon* v. *Condon*, 286 U. S. 73 (1932). But injunctive (equitable) relief, which by flexible decrees assures parties of the greatest approximation of their normal rights, has been hedged about by a traditional reluctance to grant equitable relief in cases involving political rights.

The traditional reluctance of Federal Courts to exercise their equitable powers in voting cases seems to stem from the case of *Giles* v. *Harris*, 189 U. S. 475 (1903): In the *Giles* case Mr. Justice Holmes found many practical obstacles to the use of equitable judicial power, none of which are present in the case at bar. Nevertheless, the opinion stated:

> *"We are not prepared to say that the decree should be affirmed on the ground that the subject matter is wholly beyond the jurisdiction of the Circuit Court* • • •.
>
> "It will be observed, in the first place, that the language of (Title 42 USC 1983) does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject-matter for that kind of relief. The words are, 'shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.' They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. *The traditional limits of proceedings in equity have not embraced a remedy for political wrongs.*" (Emphasis supplied.)

Since the means of enforcing the substantive rights granted by Title 42 USC, Section 1983 is provided in Title 28 USC, Section 1343 (*Glicker* v. *Michigan Liq. Contr. Comm.*, 160 Fed. 2d 96 (C.A. 6, 1947)) the deficiency pointed out by Mr. Justice Holmes is now remedied by legislation specifically relating equity jurisdiction to voting rights cases. In Section 121 of the Civil Rights Act of 1957, Title 28 USC § 1343(4) Congress has unequivocally provided for equitable jurisdiction in cases involving the right to vote. It is significant that Part III of the Act is entitled "To STRENGTHEN THE CIVIL RIGHTS STATUTES * * *" and that the amendment supplements pre-existing procedural legislation by adding, "To recover damages or to *secure equitable* or other relief under any Act of Congress providing for the protection of Civil Rights, *including the right to vote.*" (Emphasis added.) Obviously Congress intended by the addition of this subparagraph that the Federal Courts should not refuse to exercise equitable jurisdiction in cases, such as this, involving the right to vote. If the phrase, "including the right to vote," is to have any meaning it must be that the traditional hesitance of the judiciary to grant equity in political rights cases must yield to the will of Congress, and that the right to vote be enforceable by the full powers of the judiciary.

Neither the separation of powers nor equitable self-restraint doctrines bars the Federal Court from declaring unconstitutional a statute which deprives citizens of rights secured by the Constitution simply because the statutes purports to exercise the legislature's power to define municipal boundaries.

The court below reasoned that inasmuch as the creation of municipalities and the delineation of their boundaries are the exclusive prerogative of the legislative branch of Government, then the judiciary lacks jurisdiction to rule upon the validity of the Act here in question. A necessary premise to this conclusion is that the voiding of

the statute is tantamount to the judicial creation of a municipal boundary. In support of its conclusion the court stated that the power to prescribe municipal boundaries is exclusively in the Legislature and "*when duly exercised*, cannot be *revised* by the courts" (emphasis supplied). The court failed to recognize, however, that a court may invalidate such a statute when the legislative power was *not duly exercised* on grounds other than those related to the propriety of the boundary determination itself, and that such a ruling does not involve legislative or "political" action.

The Alabama Legislature did not here prescribe a municipal boundary which incidentally inconvenienced petitioners by taking from them certain voting and property rights, rather it deprived petitioners of certain voting and property rights and incidentally changed the city's boundaries to accomplish this purpose. The distinction is both real and important. True, the legislature, not the courts, must define the boundaries of a municipality, but while this prevents a court from substituting its judgment for that of the legislature in passing upon the wisdom of the boundary chosen, it does not prevent the court from determining whether the act is invalid for other reasons.

The decision of the court below, if carried to its ultimate conclusion, negates the power of the judiciary to declare any act of the legislature unconstitutional, for just as the power to draw municipal boundaries is a legislative function, so also is the power to enact laws. If the invalidation of a statute which determines a corporate boundary is necessarily the exercise of a legislative function by the court, then the invalidation of any statute is tantamount to an exercise of a legislative function by a court. But, just as the judiciary does not pass a law when it declares a statute unconstitutional, neither does it create a boundary when it declares one unconstitutional. It is not within the power of a court to create a municipal corporation or to

fix its boundaries, or to ascertain pertinent subjects for legislation, or to levy taxes, or to regulate public utilities or to define a crime or to enact laws, but this does not prevent the courts from declaring any of the above acts of the legislature unconstitutional. A court cannot levy a tax or question the wisdom of the legislature in so doing, but a court can determine that a tax levying statute violates the Fourteenth Amendment in that it takes property without due process or that it denies equal protection of the laws. Likewise a court cannot create a municipality, or prescribe its boundaries but a court can decide that such a statute violates the Fourteenth or Fifteenth Amendments in that it deprives petitioners of property without due process, that it denies them of equal protection, or that it deprives them of their right to vote on account of race. It is remarkable and incomprehensible that the majority below seemed to rely on the case of *Ex Rel. Fred H. Davis, et al.* v. *City of Stuart*, 120 So. 335; 64 A.L.R. 1307, 1321, 1322, 1323, 1324 (1929). A study of this case shows that its reasoning and language squarely supports the petitioners:

> "It is believed that the above quotations give a fair compendium of the reasoning underlying the numerous cases supporting the majority view that the legislative power in this regard is absolute and unlimited, and not subject to judicial review. They come from such high sources as to compel respectful consideration. But, as forcible, persuasive, and even brilliant as some of these arguments in behalf of the majority view are, their thoughtful perusal, and especially the conclusion arrived at, leaves something to be desired. One cannot suppress the thought that, if this view be accepted without qualification and followed to its logical conclusion, what may the Legislature not do * * *?
>
> "And if this doctrine be fully adopted, what becomes of those sacred and basic rights of person and property, which have their roots deep in the past and

which the people of America have sought to safeguard in the Bills of Rights * * *

"This theory of unlimited power in the passage of statutes establishing or extending municipal boundaries, if correct, would make it an exception to the general rule, and that, too, without giving any sufficient reason for such exception. The general rule is that the Legislature is supreme in the legislative field, which is the most powerful branch of government, *so long as it does not violate any of the provisions of the organic law*. There is to our minds no justifiable exception of any class of legislation from this all-pervasive and fundamental principle * * *

"It thus appears to us that the contention that the power of the Legislature in this particular respect is unlimited and beyond judicial review, unless there is some specific provision of the Constitution expressly regulating or restraining the action of the Legislature in the exercise of the particular power, is unsound. Regardless of the absence of such a specific provision, while great latitude must be allowed the Legislature in such matters, yet, if the Boundary Extension Act constitutes a palpably arbitrary, unnecessary, and flagrant invasion of personal and property rights clearly guaranteed by other provisions of the Constitution, such action is as much subject to judicial review as any other class of legislation. It may be true that only the Legislature can 'draw the line,' but, if the line as drawn be unconstitutional, the courts can set it aside, leaving it to the Legislature to draw another and valid line if it so wills."

II. The power which a state may exercise over its municipalities is limited by the constitutional rights of third persons, hence an Act of the State of Alabama which has the effect of depriving petitioners of rights protected by the Federal Constitution is invalid even though the Act purports to be a manifestation of the State's recognized power to alter the boundaries of one of its municipal corporations.

The rule is universally recognized that the legislature, in the absence of specific limitations imposed by its State Constitution, has power to detach territory from its municipalities. The cases supporting this proposition are voluminous. It is likewise universally recognized that a municipal corporation with respect to its "governmental" functions, has no "rights" which are protected by the Federal Constitution—that a municipal corporation is not a "person" within the protection of the Fourteenth and Fifteenth Amendments of the Constitution of the United States.

The Court of Appeals, reasoning from the above stated principles, reached the erroneous conclusion that the Federal Constitution imposes no limitation upon the right of the Legislature of Alabama to rearrange the municipal boundaries of Tuskegee under the circumstances alleged in the complaint. To say that the *municipality* has no rights which are protected by the Federal Constitution is not to say that the Federal Constitution imposes no limits on the power of the legislature to act in such matters. The court below failed to distinguish between cases involving the rights of third persons on the one hand and the rights of municipalities on the other.

An Act of the legislature dealing with a municipality, while not assailable on the ground that it abridges a constitutional right of the municipality may nevertheless be invalid if it arbitrarily abridges a constitutional right of some third person.

That the Court of Appeals was applying a correct principle of law in an incorrect manner becomes apparent when the cases cited by it as containing "governing principles" are analyzed. In those cases (*Hunter* v. *City of Pittsburgh*, 207 U. S. 161 (1907); *City of Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394 (1919), and *City of Trenton* v. *State of New Jersey*, 262 U. S. 182 (1923)) redress was sought for the abridgement of a supposed constitutional right of the municipality. These cases merely recognize the fact that a municipality is not a person and hence has no rights which are protected by the Federal Constitution; that the relationship between a city and its state is governed by state law and hence does not present a "Federal question" and that property owned by a city in its governmental capacity is not protected against state taking by the Federal Constitution.

Petitioner here, however, are not complaining of an injury done to the City of Tuskegee, but rather of one done themselves. They are not asserting that the Act in question deprives Tuskegee of property without due process of law, nor that it denies equal protection to Tuskegee, nor that Tuskegee's right to vote has been abridged, rather they are asserting that under the guise of prescribing municipal boundaries, the State of Alabama has purposefully and systematically deprived them of property and of the right to vote by an Act which was purely arbitrary, unreasonable and wholly unrelated to any legitimate municipal purpose, and that hence their rights under the Fourteenth and Fifteenth Amendments have been abridged.

The limits imposed upon the Legislature in dealing with its municipalities are basically the same as those imposed on any so-called "exclusively legislative" function. Particularly in the regulation of matters which affect public health and safety does the Legislature have broad—almost sacred—powers; yet even in this field these same limitations are always present. The nature and definition of

these limitations on legislative power may be abstracted from the following statements:

> "No court, state or federal, has held that a state legislature has unlimited power or authority even with respect to such subjects as the health and welfare of the people of the state. The primary responsibility rests with the state legislature, but courts have a solemn and inescapable duty, in an appropriate case, of deciding whether state action is so *arbitrary and unreasonable as to be unconstitutional.*" *England* v. *Louisiana State Board of Medical Exam.*, 263 F. 2d 661, 663 (C. A. 5, 1959). (Emphasis supplied.)
>
> The law must have some "real or substantial relation" to the subject matter which has supposedly caused the legislative power to be evoked. *Jacobson* v. *Mass.*, 197 U. S. 11, 31 (1905).
>
> The statute may not be "so unreasonable and extravagant as to interfere with property and personal rights of citizens *unnecessarily and arbitrarily*" (emphasis added). *Watson* v. *Maryland*, 218 U. S. 173, 178 (1910).
>
> Acts are invalid which "have no rational relation" to the objective for which the legislative power has been seemingly evoked. *Williamson* v. *Lee Optical Company*, 348 U. S. 483, 491 (1955).

By analogy, a statute detaching territory from a municipality is unconstitutional when it deprives former residents of property without due process or denies them equal protection of the laws or abridges their right to vote *and when* the statute is purely arbitrary, unreasonable and in no way rationally related to any valid municipal or public purpose or good. It is the combination of an injury on the one hand with arbitrariness and lack of municipal or public necessity or convenience on the other that condemns the statute. The statute here in question was not only "arbitrary" it was a calculated deprivation of the peti-

tioners' rights secured by the Constitution. Its only purpose was to deprive petitioners of their right to vote.

The court below held, however, that if the arbitrariness, unreasonableness, lack of proper purpose or lack of rational relation to the ostensible objective does not appear on the face of the statute, courts are helpless. Such a rule would quickly nullify the Constitution. If all a Legislature needs do to enact otherwise unconstitutional statutes is to conform them to the letter of the law, then the judiciary's function as a check on the legislative is ended. The lower court's ruling—that form governs substance—that the letter rather than the spirit of the law is controlling—is contrary to the overwhelming weight of authority. The correct rule is succinctly expressed in the case of *Fairbank* v. *United States*, 181 U. S. 283, 294, 300 (1901), as follows:

> "[W]hat cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. * * * Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

A State legislature cannot abridge the constitutional rights of a citizen through the guise of exercising its power over municipalities. Typical of cases recognizing this principle are those which hold that the constitutional protection against impairment of contract obligations invalidated legislation dealing with municipalities when this constitutional protection is breached thereby. Likewise the Constitutional protection against discrimination and denial of due process will invalidate legislation contracting municipal boundaries when the rights of third persons secured thereby are arbitrarily abridged.

The Court of Appeals attempted to distinguish the impairment of obligation of contract cases from the present situation by stating that the petitioners have no contractual rights which are violated by the act in question. This is beside the point. The obligation of contract cases stand for the proposition that the so-called plenary power of the legislature to deal with its municipalities is limited by the constitutional rights of third persons. This is no less true of the protections guaranteed by the Fourteenth and Fifteenth Amendments than of the protections guaranteed by Article I, Section Ten, of the Federal Constitution.

The rule expounded by Mr. Justice Field in the case of *United States* v. *Mayor, etc. of New Orleans*, 103 U. S. 358, 365 (1881), seems controlling on this issue:

> "The argument in support of the Act is substantially this: that the taxing power belongs exclusively to the Legislative Department of the Government, and when delegated to a municipal corporation may, equally with other powers of the corporation, be revoked or restricted at the pleasure of the Legislature.
> "It is true that the power of taxation belongs exclusively to the Legislative Department, and that the Legislature may at any time restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, *subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate directly upon contracts* * * * so as to impair their obligations * * *." (Emphasis added.)

If but slightly altered, the above statement would serve as the opinion in this case:

> The argument in support of the Act is substantially this: that the power to prescribe municipal boundaries belongs exclusively to the Legislative Department of the Government, and municipal boundaries

may be increased, decreased, altered or wholly abolished at the pleasure of the Legislature. It is true that the power to prescribe municipal boundaries belongs exclusively to the Legislative Department, and that the Legislature may at any time decrease or alter at its pleasure the boundaries of a municipal corporation, subject, however, to this qualification, which attends all state legislation, that its action in that respect shall not conflict with the prohibitions of the Constitution of the United States and, among other things, shall not operate so as to deprive citizens of property, equal protection of the laws or of the right to vote in contravention of the Fourteenth or Fifteenth Amendments.

III. The Act of the Alabama legislature in question denies and abridges the constitutionally protected rights of the petitioners.

A. In contravention of the Fifteenth Amendment, the Act denies the petitioners the right to vote solely because of their race.

This legislative enactment is but one more of the numerous attempts of the constituted authorities of some states to disfranchise Negroes and destroy their constitutionally protected right to vote. This Court has been repeatedly faced with the schemes and devices utilized by such states, but it has always been quick to recognize the motivating purpose underlying such enactments, and it has jealously applied the proscription of the Fifteenth Amendment of the United States Constitution.

Counsel agrees with the District Court that legislative wisdom is not a subject for judicial inquiry; however, its manifestation as reflected in the effect and operation of a statute is properly within the scope of review:

> "And the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of legislators in

> passing them, except as they may be disclosed on the face of the Act, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purpose they had in view, will always be presumed to accomplish that which follows as the natural and reasonable effect of their enactments." *Soon Hing* v. *Crowley*, 113 U. S. 703, 710 (1885).

Where, then, as here no legislative intent or purpose is clearly discernible on the face of the statute, the Court must look to the effect of its operations. Speaking for the Court in 1890, Justice Harlan put it this way:

> "There may be no purpose upon the part of a Legislature to violate the provisions of that instrument (the Constitution), and yet a statute enacted by it, under the form of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the Statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court." *Minnesota* v. *Barber*, 136 U. S. 313, 319 (1890).

Counsel contend that, unlike the *Barber* case, not only is the operation of the statute unconstitutional, but the legislative purpose clearly ascribable to it violates the provisions of that instrument.

When the Act is viewed "in the light of its history and of its present setting, it is seen to be a deliberate and calculated device * * *" (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936). As soon as it became apparent that discrimination at the polls based on race would not be permitted, some states sought to achieve that end by indirection. The originators of the "Grandfather clause" argued to this Court that it should not ascribe an occult motive to the legislature and that inequalities arising from the operation of the statute were the natural consequences of inherent circumstances. *Guinn* v. *United States*, 238

U. S. 347, 359 (1915). But the Court saw beyond the apparently innocent statute to its purpose. The next calculated device was an attempt to disguise state action with the cloak of private organization, but even the most extreme disguise disintegrated upon judicial inquiry. *Nixon* v. *Herndon*, 286 U. S. 73 (1932); *Smith* v. *Allwright*, 321 U. S. 649 (1944); and *Terry* v. *Adams*, 345 U. S. 461 (1953). Failing with the subterfuge of private action, next came enactments designed to vest in individual voting officials the authority to arbitrarily discriminate but again the courts affirmatively enforced the dictates of the Constitution. *Baskin* v. *Brown*, 174 F. 2d 391 (C. A. 4, 1949); and *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala., 1949). The case at bar presents one more statute in the same pattern, enacted for the same purpose, and intended to achieve the same effect.

The Act of the Alabama legislature, if viewed in a vacuum, appears innocent on its face. It is contended on behalf of its validity that it is merely a change in a municipal boundary, the sort which legislatures are always making for various reasons. But law does not operate in a vacuum and the petition filed below sets forth allegations of fact which will render the statute invalid and reveal it as an "ingeniously or ingenuously" contrived scheme to discriminate against the petitioners solely because of their race. The facts cast the framework within which this statute must be considered; the fact that the Civil Rights Commission reports that it received more complaints of voting discrimination from Macon County, Alabama, the county in which Tuskegee is located, than from any other county in the country (Report of the United States Commission on Civil Rights, 1959, p. 56); the fact that proceedings have been instituted arising from the vast pattern of discrimination in Macon County and the District Court for the Middle District of Alabama will determine the matter on its merits after remand by this Court (*United States* v. *Alabama*, — U. S. —, 4 L. ed. 2d 982 (1960)); the

fact that all persons who will be outside of the boundary of Tuskegee as a result of this statute are Negroes; the fact that what was a four-sided boundary is now a twenty-eight-sided indescribable figure; the fact that only four registered Negro voters are within the defined municipal limits; the fact that not a single white person is adversely affected by the new boundary. Could legislative purpose be more clearly evident if the statute had a preamble to the effect that the desired aim of the legislature was to remove all Negro voters in Tuskegee from municipal elections without in any way prejudicing the existing rights of any white citizens? It could not!

State action prohibited by the Constitution cannot be accomplished by indirection. *Guinn* v. *United States*, 238 U. S. 347 (1915); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); and *Lane* v. *Wilson*, 307 U. S. 268 (1939). As stated in *Lane* v. *Wilson*, "The (Fifteenth) Amendment nullifies sophisticated as well as simple-minded modes of discrimination." (*Supra*, at p. 275.) The parallel between this case and the *Guinn* case is striking. Here, as in that case, the legislative action would normally be within the scope of legitimate authority; here, as in that case, the statute is innocent on its face if no reference is made to surrounding circumstances. What appears as an innocuous but arbitrary statutory reference to an objective fact, a boundary here, a date there, is in fact a calculated scheme of discrimination because of other related objective facts. In *Guinn*, it was not mere coincidence that the date providing the exemption for literacy requirements was one before which no Negroes were registered to vote; in this case, it is not mere coincidence that the boundary line established excludes all but four registered Negro voters, but not one white voter.

Judge Parker has eloquently given expression to the contentions of the petitioners:

> "An essential feature of our form of government is the right of citizens to participate in the governmental process. The political philosophy of the

Declaration of Independence is that governments derive their just power from the consent of the governed; and the right to a voice in the selection of officers of government on the part of all citizens is important, not only as a means of insuring that government shall have the strength of popular support, but also as a means of securing to the individual citizen proper consideration of his rights by those in power. The Fourteenth and Fifteenth Amendments were written into the Constitution to insure to the Negro, who has recently been liberated from slavery, the equal protection of the law and the right to full participation in the process of government. These amendments have had the effect of creating a federal basis of citizenship and of protecting the rights of individuals and minorities from many abuses of governmental power which were not contemplated at the time. Their primary purpose must not be lost sight of, however, and no election machinery can be upheld if its purpose or effect is to deny to the Negro, on account of his race or color, any effective voice in the government of his country or the state or community wherein he lives." *Rice* v. *Elmore*, 165 F. 2d 387, 392 (C. A. 4, 1947).

B. In contravention of the Fourteenth Amendment, the Act denies the petitioners equal protection of the law, and takes property from them without due process of law.

It is the contention of the petitioners that the Act of the Alabama legislature has as its primary purpose the disenfranchisement of Negroes because of their race, but the effect of the statute not only abridges the right guaranteed by the Fifteenth Amendment, it also violates the protection afforded by the Fourteenth Amendment.

The principle that the rights and privileges which inure to citizens of a municipality are derivative of the obligations imposed by citizenship is not questioned. What is in issue is whether a state can deny such rights and privileges, while admittedly dissolving the concurrent obliga-

tions, where the basis for classification is undoubtedly the race or color of the persons involved. Petitioners did not contend that classification resulting from a redetermination of a municipal boundary is, in and of itself, invalid; but when the classification is based only on race or color, it is prohibited. As Justice Holmes said: "States may do a good deal of classifying that is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the rights set up in this case." (*Nixon* v. *Herndon*, 273 U. S. 536, 541 (1927).)

Fire protection, police protection, sewerage disposal, street maintenance and zoning regulations are but typical of the benefits which citizens of a municipality enjoy and by which the value of their property is enhanced. To take from persons these advantages with the consequent loss of value to their property solely because of their race is clearly violative of the Fourteenth Amendment. It is again the legislative purpose which so thoroughly and pervasively taints the statute that brings it into conflict with the Constitution. The authority relied on by the court below adheres to the principle of the plenary power of a state legislature to alter municipal boundaries. This authority, however, is not applicable to the present case. The classification of petitioners because of their race or color resulting in decreased property values and unequal enjoyment of beneficial facilities is clearly prohibited by the Fourteenth Amendment:

> "The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on consideration of race or color. Seventy-five years ago this Court announced that the provisions of the Amend-

ments are to be construed with this fundamental purpose in mind." *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948).

To allow this statute to stand without even the introduction of evidence by petitioners sustaining their allegations is contrary to the long line of decisions of this Court construing the Fourteenth and Fifteenth Amendments. To allow this statute to stand provides legal sanction to a range of state activity which seeks to disregard and nullify the interpretation asserted by this Court. To allow this statute to stand denies petitioners protection from abridgment of their vital constitutional rights. "To do so would be to shut our eyes to what all others than we can see and understand." *United States* v. *Butler*, 297 U. S. 1, 61 (1936).

C. In contravention of the petitioners' constitutionally protected rights, the Act discriminates against petitioners solely because of race.

Though petitioners have no constitutional right to live in Tuskegee, they do have a constitutional right not to be excluded from Tuskegee because of their race. The infirmity of the statute challenged is its inherent use of race as a means of defining corporate limits. Race may never be the basis of the exercise of state power otherwise valid. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944); *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Korematsu* v. *United States*, 323 U. S. 214 (1944).

Relieving petitioners of their civil obligations does not constitutionally justify the State in excluding petitioners from Tuskegee any more than relieving Negroes of paying local school taxes would constitutionally justify excluding them from public schools.

The question of the presence of racial discrimination in a statute may be determined from the effect of the statutes as well as from its stated purpose. The question is not what the enactment says or fails to say; but what in fact it does. *Dobbins* v. *City of Los Angeles*, 195 U. S. 223 (1904); see cases cited in Section II, *supra*. The bold statement of a racially discriminatory purpose of course assists a court in determining the statute's effect; the absence thereof, however, does not deprive a petitioner of the opportunity to charge and prove racial discrimination through legislative enactment.

We suppose that the petitioners would have an easier case to prove on trial—and the Court would have been more ready to void a statute which provided that Tuskegee's limits extend from a central point a radius of two miles but excluding every premise occupied by a Negro. However, the petitioners have charged and would be required to prove at trial substantially the same effect on them. Upon such proof, the effect of this statute—motive aside—is to exclude Negroes from Tuskegee. Is there any power in Alabama to legislate to this end?

Conclusion

For the foregoing reasons the decision of the court below affirming the District Court's sustaining of the motion to dismiss should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 32.—October Term, 1960.

C. G. Gomillion, et al., Petitioners, v. Phil M. Lightfoot, as Mayor of the City of Tuskegee, et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November 14, 1960.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This litigation challenges the validity, under the United States Constitution, of Local Act No. 140, passed by the Legislature of Alabama in 1957, redefining the boundaries of the City of Tuskegee. Petitioners, Negro citizens of Alabama who were, at the time of this redistricting measure, residents of the City of Tuskegee, brought an action in the United States District Court for the Middle District of Alabama for a declaratory judgment that Act 140 is unconstitutional, and for an injunction to restrain the Mayor and officers of Tuskegee and the officials of Macon County, Alabama, from enforcing the Act against them and other Negroes similarly situated. Petitioners' claim is that enforcement of the statute, which alters the shape of Tuskegee from a square to an uncouth twenty-eight-sided figure, will constitute a discrimination against them in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution and will deny them the right to vote in defiance of the Fifteenth Amendment.

The respondents moved for dismissal of the action for failure to state a claim upon which relief could be granted and for lack of jurisdiction of the District Court. The

court granted the motion, stating, "This Court has no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama." 167 F. Supp. 405, 410. On appeal, the Court of Appeals for the Fifth Circuit, affirmed the judgment, one judge dissenting. 270 F. 2d 594. We brought the case here since serious questions were raised concerning the power of a State over its municipalities in relation to the Fourteenth and Fifteenth Amendments. 362 U. S. 916.

At this stage of the litigation we are not concerned with the truth of the allegations, that is, the ability of petitioners to sustain their allegations by proof. The sole question is whether the allegations entitle them to make good on their claim that they are being denied rights under the United States Constitution. The complaint, charging that Act 140 is a device to disenfranchise Negro citizens, alleges the following facts: Prior to Act 140 the City of Tuskegee was square in shape; the Act transformed it into a strangely irregular twenty-eight-sided figure as indicated in the diagram appended to this opinion. The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including *inter alia*, the right to vote in municipal elections.

These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely

concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens. "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U. S. 268, 275.

The complaint amply alleges a claim of racial discrimination. Against this claim the respondents have never suggested, either in their brief or in oral argument, any countervailing municipal function which Act 140 is designed to serve. The respondents invoke generalities expressing the State's unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions, to wit, cities, counties, and other local units. We freely recognize the breadth and importance of this aspect of the State's political power. To exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions in the leading case of *Hunter* v. *Pittsburgh*, 207 U. S. 161, and related cases relied upon by respondents.

The *Hunter* case involved a claim by citizens of Allegheny, Pennsylvania, that the General Assembly of that State could not direct a consolidation of their city and Pittsburgh over the objection of a majority of the Allegheny voters. It was alleged that while Allegheny already had made numerous civic improvements, Pittsburgh was only then planning to undertake such improvements, and that the annexation would therefore greatly increase the tax burden on Allegheny residents. All that the case held was (1) that there is no implied

contract between a city and its residents that their taxes will be spent solely for the benefit of that city, and (2) that a citizen of one municipality is not deprived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of his city with another. Related cases, upon which the respondents also rely, such as *Trenton* v. *New Jersey*, 262 U. S. 182; *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394; and *Laramie County* v. *Albany County*, 92 U. S. 307, are far off the mark. They are authority only for the principle that no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities solely as a result of their relationship.

In short, the cases that have come before this Court regarding legislation by States dealing with their political subdivisions fall into two classes: (1) those in which it is claimed that the State, by virtue of the prohibition against impairment of the obligation of contract (Art. I, § 10) and of the Due Process Clause of the Fourteenth Amendment, is without power to extinguish, or alter the boundaries of, an existing municipality; and (2) in which it is claimed that the State has no power to change the identity of a municipality whereby citizens of a pre-existing municipality suffer serious economic disadvantage.

Neither of these claims is supported by such a specific limitation upon State power as confines the States under the Fifteenth Amendment. As to the first category, it is obvious that the creation of municipalities—clearly a political act—does not come within the conception of a contract under the *Dartmouth College* case. 4 Wheat. 518. As to the second, if one principle clearly emerges from the numerous decisions of this Court dealing with taxation it is that the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers.

Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases.

The *Hunter* opinion itself intimates that a state legislature may not be omnipotent even as to the disposition of some types of property owned by municipal corporations, 207 U. S., at 178–181. Further, other cases in this Court have refused to allow a State to abolish a municipality, or alter its boundaries, or merge it with another city, without preserving to the creditors of the old city some effective recourse for the collection of debts owed them. *Shapleigh* v. *San Angelo*, 167 U. S. 646; *Mobile* v. *Watson*, 116 U. S. 289; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514; *Broughton* v. *Pensacola*, 93 U. S. 266. For example, in *Mobile* v. *Watson* the Court said:

> "Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void." *Mobile* v. *Watson*, *supra*, 116 U. S., at 305.

This line of authority conclusively shows that the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of

consequences. Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. The observation in *Graham* v. *Folsom*, 200 U. S. 248, 253, becomes relevant; "The power of the State to alter or destroy its corporations is not greater than the power of the State to repeal its legislation." In that case, which involved the attempt by state officials to evade the collection of taxes to discharge the obligations of an extinguished township, Mr. Justice McKenna, writing for the Court, went on to point out, with reference to the *Mount Pleasant* and *Mobile* cases:

> "It was argued in those cases, as it is argued in this, that such alteration or destruction of the subordinate governmental divisions was a proper exercise of legislative power, to which creditors had to submit. The argument did not prevail. It was answered, as we now answer it, that such power, extensive though it is, is met and overcome by the provision of the Constitution of the United States which forbids a State from passing any law impairing the obligation of contracts. . . ." 200 U. S., at 253–254.

If all this is so in regard to the constitutional protection of contracts, it should be equally true that, to paraphrase, such power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States, which forbids a State from passing any law which deprives a citizen of his vote because of his race. The opposite conclusion, urged upon us by respondents, would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S. 583, 594.

The respondents find another barrier to the trial of this case in *Colegrove v. Green*, 328 U. S. 549. In that case the Court passed on an Illinois law governing the arrangement of congressional districts within that State. The complaint rested upon the disparity of population between the different districts which rendered the effectiveness of each individual's vote in some districts far less than in others. This disparity came to pass solely through shifts in population between 1901, when Illinois organized its congressional districts, and 1946, when the complaint was lodged. During this entire period elections were held under the districting scheme devised in 1901. The Court affirmed the dismissal of the complaint on the ground that it presented a subject not meet for adjudication.* The decisive facts in this case, which at this stage must be taken as proved, are wholly different from the considerations found controlling in *Colegrove*.

That case involved a complaint of discriminatory apportionment of congressional districts. The appellants in *Colegrove* complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens. Apart from all else, these considerations lift this

*Soon after the decision in the *Colgrove* case, Governor Dwight H. Green of Illinois in his 1947 biennial message to the legislature recommended a reapportionment. The legislature immediately responded, 1947 Ill. Sess. Laws, p. 879, and in 1951 redistricted again. 1951 Ill. Sess. Laws, p. 1924.

controversy out of the so-called "political" arena and into the conventional sphere of constitutional litigation.

In sum, as Mr. Justice Holmes remarked, when dealing with a related situation, in *Nixon* v. *Herndon*, 273 U. S. 536, 540, "Of course the petition concerns political action," but "The objection that the subject matter of the suit is political is little more than a play upon words." A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries. According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove* v. *Green*.

When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional condition." What the Court has said in those cases is equally applicable here, *viz.*, that "Acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States* v. *Reading Co.*, 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an

unconstitutional result." *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 114. The petitioners are entitled to prove their allegations at trial.

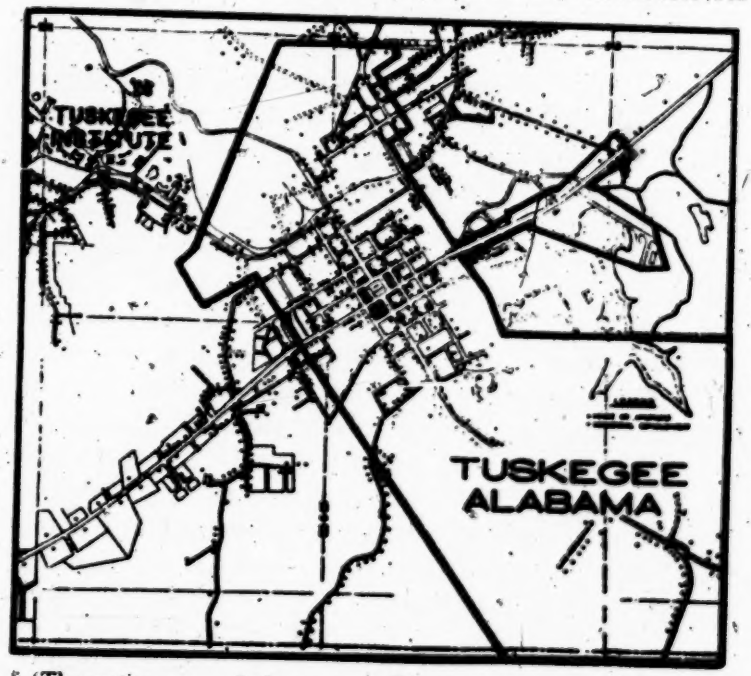
For these reasons, the principal conclusions of the District Court and the Court of Appeals are clearly erroneous and the decision below must be

Reversed.

MR. JUSTICE DOUGLAS, while joining the opinion of the Court, adheres to the dissents in *Colegrove* v. *Green*, 328 U. S. 549, and *South* v. *Peters*, 339 U. S. 276.

APPENDIX.

CHART SHOWING TUSKEGEE, ALABAMA, BEFORE AND AFTER ACT 140



(The entire area of the square comprised the city prior to Act 140. The irregular black-bordered figure within the square represents the post-enactment city.)

SUPREME COURT OF THE UNITED STATES

No. 32.—October Term, 1960.

C. G. Gomillion, et al., Petitioners, *v.* Phil M. Lightfoot, as Mayor of the City of Tuskegee, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[November 14, 1960.]

Mr. Justice Whittaker, concurring.

I concur in the Court's judgment, but not in the whole of its opinion. It seems to me that the decision should be rested not on the Fifteenth Amendment, but rather on the Equal Protection Clause of the Fourteenth Amendment to the Constitution. I am doubtful that the averments of the complaint, taken for present purposes to be true, show a purpose by Act 140 to abridge petitioner's "right . . . to vote," in the Fifteenth Amendment sense. It seems to me that the "right . . . to vote" that is guaranteed by the Fifteenth Amendment is but the same right to vote as is enjoyed by all others within the same election precinct, ward or other political division. And, inasmuch as no one has the right to vote in a political division, or in a local election concerning only an area in which he does not reside, it would seem to follow that one's right to vote in Division A is not abridged by a redistricting that places his residence in Division B *if* he there enjoys the same voting privileges as all others in that Division, even though the redistricting was done by the State for the purpose of placing a racial group of citizens in Division B rather than A.

But it does seem clear to me that accomplishment of a State's purpose—to use the Court's phrase—of "fencing

Negro citizens out of Division A and into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1; and, as stated, I would think the decision should be rested on that ground—which, incidentally, clearly would not involve, just as the cited cases did not involve, the *Colegrove* problem.